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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 71-162

THE BOARD OF REGENTS OF STATE COLLEGES, and ROGER E. GUILES,
Petitioners,

v.

DAVID F. ROTH, for himself and for all others similarly situated,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

ROBERT W. WARREN
Attorney General of Wisconsin

ROBERT D. MARTINSON
Assistant Attorney General

CHARLES A. BLECK
Assistant Attorney General

Attorneys for Petitioners

Post Office Address:

114 East, State Capitol
Madison, Wisconsin 53702

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioners, The Board of Regents of State Colleges, and Roger E. Guiles respectfully petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on July 1, 1971.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, appears in the appendix. The opinion of the District Court for the Western District of Wisconsin is reported in 310 F. Supp. 972 and is printed in the appendix.

JURISDICTION

The judgment of the Court of Appeals was entered on July 1, 1971, and on July 14, 1971, that Court granted a stay of mandate in accordance with Rule 41 (b) of the Federal Rules of Appellate Procedure. This petition for certiorari was filed within the period of the 30 day stay of mandate. This Court's jurisdiction is involved under 28 U.S.C. § 1254 (1).

QUESTION PRESENTED

Whether a probationary instructor at a state university, who is employed on an academic year to year basis prior to the acquiring of tenure under state law, has the right under the Fourteenth Amendment due process clause to a written statement of reasons as to why he is not going to be given a contract of employment for the ensuing academic year and an administrative hearing on those reasons?

STATUTES INVOLVED

Wisconsin Statutes 1967, 37.11, 37.11 (3) and 37.31 (1)

37.11 Powers of board as to state colleges. The said board shall have the government and control of all the state colleges, and may:

(3) Remove at pleasure any president, assistant or other officer or person from any office or employment in connection with any such college, but discharges of teachers shall be governed by s. 37.31.

37.31 Teachers employed on probation; tenure; compulsory retirement. (1) All teachers in any state university shall initially be employed on probation. The employment shall be permanent, during efficiency and good behavior after 4 years of continuous service in the state university system as a teacher. An official leave of absence shall not constitute a break in continuous service, nor shall it count toward the 4 years required to attain tenure. No teacher who has become permanently employed as herein provided shall be discharged except for cause upon written charges. Within 30 days of receiving the written charges, such teacher may appeal the discharge by a written notice to the president of the board of regents of state colleges. The board shall cause the charges to be investigated, hear the case and provide such teacher with a written statement as to their decision. The action and decision of the board in the matter shall be final. The term "teachers" as used in this section includes all persons engaged in teaching as their principal occupation but shall not include any university president or acting president in his capacity as president of any of the state universities.[1]

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[1] The Legislature has since increased the probationary period to six years Ch. 233, Laws of 1969, effective November 26, 1969.

STATEMENT OF THE CASE

Petitioner, Board of Regents of State Universities, is a public board established by Chapter 37 of the Wisconsin Statutes and entrusted with the government and control of the nine Wisconsin State Universities. Petitioner, Roger E. Guiles, is the president of the State University at Oshkosh.[2]

David F. Roth, respondent, hereinafter referred to by name, was employed by the Board of Regents of State Universities on June 12, 1968, as an assistant professor at the Wisconsin State University-Oshkosh for one academic year commencing September 1, 1968 and ending June 30, 1969. He had never before been employed in the State University system.

Dr. Roth's contract of employment provided that "the employment of any staff member for an academic year shall not be for a term beyond June 30th of the fiscal year in which the appointment is made." (In this case June 30, 1969).

Roth was employed under the provisions of sec. 37.11, Wis. Stats., which authorized the Board of Regents:

> "(3) To remove at pleasure any president, assistant or other officer or person from any office or employment in connection with any such college, but discharges of teachers shall be governed by s. 37.31."

His employment was also governed by sec. 37.31, Stats. The pertinent part was as follows:

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[2] Until recently the Board was known as Board of Regents of State Colleges and the State Universities were known as State Colleges.

> "(1) All teachers in any state university shall initially be employed on probation. The employment shall be permanent, during efficiency and good behavior after 4 years of continuous service in the state university system as a teacher. * * * No teacher who has become permanently employed as herein provided shall be discharged except for cause upon written charges. * * *"

Pursuant to the notice requirements of the Board of Regents, Dr. Roth was advised of President Guiles' decision not to employ him for the following academic year by letter dated January 30, 1969.

The letter gave no reasons which was consistent with Rule II of the Board of Regents which provided:

> "During the time a faculty member is on probation, no reason for nonretention need be given."[3]

On February 14, 1969, Dr. Roth commenced an action in the District Court for the Western District of Wisconsin under 42 U.S.C. § 1983, asserting that the decision not to employ him for another year and the failure to give him a statement of reasons for not reemploying him and a hearing thereon, violated his rights under the First, Fifth and Fourteenth Amendments to the Constitution of the United States.

Dr. Roth moved for "partial" summary judgment and on March 12, 1970, the District Court entered its Memorandum Opinion and Order, which ordered and adjudged that by March 20 the petitioners give Roth a written statement of reasons on which they had relied in deciding not to offer him a contract for the next academic year; that they schedule a hearing before June 30, 1970, at which he might respond to the stated

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[3] Dr. Roth was not discharged but completed the academic year 1968-1969. Nonretention refers to nonrenewal of a contract and not discharge.

reasons; and then that within 15 days after the hearing they notify his counsel either that he will or will not be offered a contract for the coming academic year; or in the alternative to such notice and hearing that petitioners offer Roth a contract as a member of the faculty for the academic year 1970-1971, on as favorable terms as his previous contract.

In the memorandum opinion accompanying the order and judgment, the District Judge went beyond the particular case, and held broadly and apparently with respect to all probationary university professors, as follows:

> "* * *I hold that minimal procedural due process includes a statement of the reasons why the university intends not to retain the professor, notice of a hearing at which he may respond to the stated reasons, and a hearing if the professor appears at the appointed time and place. At such a hearing the professor must have a reasonable opportunity to submit evidence relevant to the stated reasons. The burden of going forward and the burden of proof rests with the professor."

Petitioners filed a notice of appeal to the United States Court of Appeals for the Seventh Circuit on April 10, 1970, and moved for a stay of the Court's order pending the appeal. An order granting the stay was entered.

The Court of Appeals affirmed the judgment on July 1, 1971,[1] holding in part:

> "* * * Necessarily our affirmance does not deprive the district court of power to modify the judgment so as to make adjustments for the passage of time or circumstances which have arisen since its entry." (See page 206 of appendix hereto.)

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[1] Hon. F. Ryan Duffy, Senior Circuit Judge, dissenting. See pages 206-216 of appendix hereto.

Petitioners' motion to the Court of Appeals for a stay of mandate pending this application was granted on July 14, 1971. See page 239 of appendix hereto.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Is In Conflict With Decisions Of This Court.

The decision below notes from *Cafeteria Workers v. McElroy* (1961), 367 U.S. 886, that the case:

> "* * * suggests that if the government action jeopardized a right to follow a chosen trade or profession, that fact would weigh upon the side of the individual. * * *"

However, this Court held in *Cafeteria Workers v. McElroy*, supra, on pages 896-897:

> "* * *It has become a settled principle that government employment, in the absence of legislation, can be revoked at the will of the appointing officer. (citing cases) This principle was reaffirmed quite recently in *Vitarelli v. Seaton*, 359 U.S. 535, 79 S, Ct. 968, L. Ed. 2d 1012. There we pointed out that Vitarelli, an Interior Department employee who had not qualified for statutory protection under the Civil Service Act, 5 USCA § 632 et seq., 'could have been summarily discharged by the Secretary at any time without the giving of a reason * * *' 359 U.S., at 539, 79 S. Ct. at p. 972."

And the Honorable F. Ryan Duffy, Senior Circuit Judge, in his dissenting opinion below states:

> "In my view, the State's interest in preserving a workable system of tenure which includes, almost by definition, the ability to select freely and maturely its non-tenured teaching personnel, far outweighs any expectancy which the plaintiff David Roth might have had in continued employment at Wisconsin State University. I believe that the

teaching of *Cafeteria Workers v. McElroy*, *supra*, supports this view especially when the great burden this Court's holding will present for states is considered. I further believe that the majority's holding is both unprecedented and represents an unwarranted intrusion of the Federal Judiciary into state education systems. * * *"

II. There Is A Conflict Among The Courts Of Appeal.

Judge Duffy's dissenting opinion below states:

"The validity of the procedures before us now was directly challenged in two other Circuit Court cases. Yet, in each case, the dismissal or non-renewal of a probationary instructor's contract, without a statement of reasons or without a hearing, was held to pass the scrutiny of the due process clause, and in each case, the Supreme Court denied certiorari. *Jones v. Hopper*, 410 F.2d 1323 (10 Cir., 1969) cert. den. 397 U.S. 991 (1970); *Freeman v. Gould Special School District*, 405 F.2d 1153 (8 Cir., 1969) cert. den. 396 U.S. 843 * * * Yet, the majority here rejects the *Freeman* and *Jones* holdings, calls into question the validity of the tenure system, and places this Circuit squarely in conflict with the Eighth and Tenth Circuits."

Nor is the *Roth* decision in harmony with the Fifth Circuit where the rule has been established in *Thau v. Board of Public Instruction of Dade Co., Fla.* (1970), 432 F.2d 98, *Pred v. Board of Public Instruction* (1969), 415 F. 2d 851 and *Sindermann v. Perry* (1970), 430 F.2d 939, cert. granted June 14, 1971, 39 L.W. 3548, that a hearing need only be given in those instances where the teacher has acquired a right of expectancy or tenure or the claim is made that nonretention is grounded upon the exercise of First Amendment

rights. Also see *Ferguson v. Thomas*, 430 F.2d 852 (5 Cir., 1970); *Lucas v. Chapman*, 430 F.2d 945 (5 Cir., 1970); *Hopkins v. Wasson*, 221 F. Supp. 278, aff'd. 329 F.2d 67 (6 Cir., 1964). To the contrary, the *Roth* decision requires a hearing, when requested, in all cases involving the nonretention of a probationary teacher.

The *Roth* decision is not in complete harmony with the First Circuit where the Court held in *Drown v. Portsmouth School District* (1970), 435 F. 2d 1182, that a probationary teacher is entitled to a statement of reasons for nonrenewal but expressly rejected the holding below regarding an administrative hearing and held that the teacher was not entitled to a hearing on the reasons for nonretention.

III. The Decision In Roth Raises Significant Problems And Results In Sweeping Changes In The Administration Of Public Education Without Practical Benefit.

The practice of the petitioners in not giving a written statement setting forth the reasons for nonretention and hearing thereon is the "* * * customary practice at approximately 1080 public colleges and universities in the United States, with almost 300,000 faculty members * * *"/5.

The giving of reasons and a hearing in every case of the nonrenewal of a probationary teacher was rejected in *Sindermann v. Perry* (1970), 430 F.2d 939, 944 as interfering with

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/5 Statement from brief of the Board of Governors of State Colleges and Universities of Illinois, the Board of Regents of Regency Universities of Illinois, the Board of Trustees of Southern Illinois University, the American Association of State Colleges and Universities, the American Council on Education and the Association of American Colleges as Amici Curiae.

freedom of contract to employ probationary teachers and was found that it would result in tenure by Court edict. Similarly, the District Court in the *Roth* decision noted the danger that any distinction between tenure and absence of tenure will shrink and disappear but balanced that result as against the interest of the probationary teacher and found it to be less persuasive (P. 228 appendix hereto). However, in balancing the interests of the state as against the interests of the teacher, the District Court did so in the absence of a record and apparently relied on judicial notice to arrive at a factual conclusion that petitioners assert is erroneous.

The dissenting opinion of Judge Duffy noted:

> "The tenure system, which has been carefully worked out throughout the years, has, at its root, the requirement that a tenured professor can only be dismissed for "cause." The assessment of whether, in fact, cause exists has traditionally included the affording of certain procedural safeguards, such as those now before us. On the other hand, non-tenured personnel has traditionally not been accorded these same protections, and they have known that this was so when they took their jobs. The majority opinion purports not to disturb that carefully worked out distinction, yet, in my view, such will be the end result." (P. 211 appendix hereto)

Academic freedom as well as academic excellence will surely suffer by the impairment of tenure.

Requiring hearings in all cases of the nonrenewal of probationary teachers will result in, as noted in *Drown v. Portsmouth School District* (1970), 435 F.2d 1182, 1185-1186, a reluctance on the part of school administrators to recommend nonretention in an attempt to avoid time consuming, expensive and possibly embarrassing hearings. The end result

will be administrative tolerance for the incompetent. Further, school administrators will exercise over-caution in hiring new teachers resulting in "a teaching force of homogenized mediocrities."

Most significant is the fact that such hearing will be purely illusory. The decision to retain or not retain a probationary teacher is an administrative decision not judicial. It cannot be made judicial or subject to judicial process for there is:

> "* * * available a very wide spectrum of reasons, some subtle and difficult to articulate and to demonstrate, for deciding not to retain a newcomer or one who has not yet won sufficient respect from his colleagues." (Decision of the District Court below, p. 227 appendix hereto)

Nor can a teacher's competence be resolved by judicial process when:

> "A professor's value depends upon his creativity, his rapport with students and colleagues and various other intangible qualities which cannot be measured by objective standards." *Lewis v. Chicago State College*, 299 F. Supp. 1357, 1359 (N.D. Ill. 1969).

Similarly, if nonretention is based on budgetary consideration, changes in curriculum or the institution's desire to foster academic excellence such administrative determinations of the school are not the proper subject for an administrative or judicial hearing.

If the hearing is to deal with constitutional issues it is likely to present difficult questions of law and fact, which are ill suited to resolution at a hearing before a university president or his delegate, or a board of regents. The issues involved in these free speech cases are more properly matters for determination in Court; and Congress has given the

teacher a forum in the Federal Court to voice any legitimate grievance. (*Drown v. Portsmouth School District*, supra, pp. 1186-1187; Dissenting Opinion below, p. 209 appendix hereto.)

The requirement that reasons and hearing be offered in all cases of nonretention will be burdensome on the universities, colleges and schools affected by it. As the result of several years of extremely rapid growth, the faculties of most colleges and universities contain a high percentage of young and untested teachers. Thus in the faculty at Oshkosh there were 442 nontenured teachers in the academic year 1968-1969 out of a total faculty of about 634 — and the proportion is somewhat the same at the other eight State Universities. The leveling-out of enrollments is sure to result in many more nonretentions in 1970 and the following years. While their number does not appear in the record here, we were informed by the State Universities system that in the academic year just ended 206 nontenured teachers were notified that they would not be retained. It is common knowledge that the seller's market in teaching talent has changed to a buyer's market, as enrollments and budgets have leveled off and Ph.Ds are in abundant supply, and the universities and colleges may be expected to take the opportunity to upgrade their younger faculties by extensive substitutions as better qualified applicants become plentiful.

Nor will the probationary teacher be necessarily benefited by a compulsory statement of reasons and hearing. Such procedure will be likely in many cases to be harmful rather than helpful to the teacher's future career; for the statement will doubtless be drawn, as well as presented, to make the best case possible for nonretention, and may spread upon the teacher's record shortcomings which he would perfer to have forgotten.

The decision below will impose a very substantial burden on the universities and others similarly situated, to draft statements of reasons and hold hearings. The clear effect of which is to have the selection of the faculty subject to judicial review. Nor is the effect of this ruling limited to academic employment. Logically, the decision would apply to all state employment as well as to all local governmental employment.

It appears to the petitioners that this decision is not only in direct conflict with two Circuits but far exceeds in scope and impact the decisions of those Circuits which have had the occasion to consider the question./[6]

This Court in granting certiorari in *Sindermann v. Perry*, supra, recognized the importance of the issues in that case. The facts of that case differ from the facts in the *Roth* case in that it appeared Mr. Sindermann could never have acquired tenure. To the contrary, in *Roth* a state statute granted tenure after a statutory probationary period. During a probationary period there clearly can be no "expectancy of reemployment," a point specifically noted and accepted by the Court in *Sindermann v. Perry*, supra, p. 944, but rejected in *Roth*. Further, it is clear under *Roth*, the school must always assign a cause for the nonrenewal of a probationary teacher's contract when requested; a view rejected by the Court in *Sindermann*, supra, p. 944. Finally, under *Roth* a hearing on nonrenewal must be given whenever requested by the probationary teacher but in *Sindermann* a hearing need only be given in those situations involving tenure, right of expectancy or where the teacher claims violation of

/[6]We have just been advised that the Sixth Circuit on June 16, 1971, in case No. 20721 reversed the decision in *Orr v. Trinter*, 318 F.Supp. 1041 (S.D. Ohio E.D. 1970) and places the Seventh Circuit in direct conflict with the Sixth Circuit.

constitutional rights or other actionable wrong. The *Roth* decision far exceeds the issues raised in *Sindermann*. The decision of the Seventh Circuit leaves governmental employment within the Circuit subject to drastic change, if not reversed.

It is respectfully submitted that certiorari be granted.

ROBERT W. WARREN
Attorney General

ROBERT D. MARTINSON
Assistant Attorney General

CHARLES A. BLECK
Assistant Attorney General

Attorneys for Petitioners